RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

CRYSTAL LIGHTFOOT
AND BEVERLY HOLLIS-ARRINGTON,
Petitioners,

v.

CENDANT MORTGAGE CORP., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

The congressional charter of the Federal National Mortgage Association (Fannie Mae or Fannie) includes among its corporate powers the capacity, "in its corporate name, to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1723a(a). The Ninth Circuit concluded that this clause automatically confers subject matter jurisdiction on the federal district courts in any case involving Fannie. In so holding, the court applied a rule that a sue-and-be-sued clause confers federal jurisdiction "if it specifically mentions federal courts." Pet. App. 6a. The court believed that rule was dictated by this Court's decision in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992).

The questions presented are:

1. Does a clause that grants a federally chartered corporation the capacity to "sue and to be sued" in courts "of competent jurisdiction" require an independent source of subject matter jurisdiction?

2. *Red Cross* held only that a sue-and-be-sued clause "may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." *Id.* at 255. Does that mean that the mere presence of the term "federal court" in such a clause is sufficient to confer subject matter jurisdiction on the federal district courts, and, if so, should that decision be overruled?

PARTIES TO THE PROCEEDINGS

Petitioners, who were Plaintiffs-Appellants below, are Crystal Lightfoot and Beverly Hollis-Arrington.

Respondents, who were Defendant-Appellees below, are Cendant Mortgage Corporation, doing business as PHH Mortgage; Fannie Mae; Robert O. Matthews; and Attorneys Equity National Corporation.

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OPINIONS AND ORDERS BELOW

The opinion of the court of appeals affirming the dismissal of Petitioners' claims is reported at 769 F.3d 681 and reprinted at Pet. App. 3a-40a. The district court's order denying Petitioners' motion to remand to state court is unreported and reprinted at Pet. App. 43a-44a.

JURISDICTION

The court of appeals entered judgment on October 2, 2014. The court of appeals denied rehearing on November 20, 2014. The petition for a writ of certiorari was timely filed on February 17, 2015, and granted on June 28, 2016. This court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1723a(a) provides:

> **(a) Seal, and other matters incident to operation**
>
> Each of the bodies corporate named in section 1717(a)(2) of this title shall have power to adopt, alter, and use a corporate seal, which shall be judicially noticed; to enter into and perform contracts, leases, cooperative agreements, or other transactions, on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or the Commonwealth of Puerto Rico, or with any political subdivision

thereof, or with any person, firm, association, or corporation; to execute, in accordance with its bylaws, all instruments necessary or appropriate in the exercise of any of its powers; in its corporate name, to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal, but no attachment, injunction, or other similar process, mesne or final, shall be issued against the property of the Association or against the Association with respect to its property; to conduct its business without regard to any qualification or similar statute in any State of the United States, including the District of Columbia, the Commonwealth of Puerto Rico, and the Territories and possessions of the United States; to lease, purchase, or acquire any property, real, personal, or mixed, or any interest therein, to hold, rent, maintain, modernize, renovate, improve, use, and operate such property, and to sell, for cash or credit, lease, or otherwise dispose of the same, at such time and in such manner as and to the extent that it may deem necessary or appropriate; to prescribe, repeal, and amend or modify, rules, regulations, or requirements governing the manner in which its general business may be conducted; to accept gifts or donations of services, or of property, real, personal, or mixed, tangible, or intangible, in aid of any of its purposes; and to do all things as are necessary or incidental to the

> proper management of its affairs and the proper conduct of its business.

28 U.S.C. § 1349 provides:

> The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.

INTRODUCTION

This case presents a clash: the plain English meaning of a statute versus a rigid rule that defies the ordinary tools of statutory construction and bears no relation to any interpretive technique this Court has ever applied.

Let us begin with plain English: Fannie Mae's charter says that Fannie "shall have power ... in its corporate name, to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1723a(a). That clause means what it says: Fannie has the capacity to bring suit on its own behalf, and can likewise be sued by others. No English speaker could read that sentence to mean what the Ninth Circuit concluded: that Congress granted *jurisdiction* to "any court ... State or Federal." Rather, the charter authorizes Fannie to litigate—but only in a "court of *competent* jurisdiction," which is to say a court that has an *independent* basis of jurisdiction.

Nevertheless, the Ninth Circuit held that these simple words mean that Congress granted jurisdiction to federal district courts over any case involving Fannie. Notably, the Ninth Circuit did not think this meant that Congress granted jurisdiction to "*any* court ... *State*"; state courts must have an otherwise "competent" basis of jurisdiction. Nor did the Ninth Circuit think this meant that Congress granted jurisdiction to "*any* court ... *Federal*"; the Court of Federal Claims, for example, is not a proper forum unless it has "competent" jurisdiction. Yet, according to the Ninth Circuit, any federal district court has jurisdiction, whether or not there is any independent basis for it.

The English language cannot get you from here to there. And the Ninth Circuit did not even try to reconcile its reading with the statute's plain meaning. It skipped past the text (and the context and the statutory evolution), in favor of a rule of construction that revolves around a single term—"federal court." The "rule," according to the Ninth Circuit, is that "a specific reference to the federal courts [i]s necessary *and sufficient* to confer jurisdiction." Pet. App. 11a (citation and internal quotation marks omitted).

There is no such "rule," and if there were, it would be absurd. It would mean that federal courts would have automatic jurisdiction over any suit involving an entity even if the charter granted the "power to sue and be sued in any court, State or Federal, that independently has jurisdiction over the case." Fannie's charter is functionally no different.

The Ninth Circuit applied this purported rule only because it thought its hands were tied. It believed that this Court's decision in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), adopted this as a "clear rule," Pet. App. 5a. But *Red Cross* said no such thing. Rather, it followed a line of cases about sue-and-be-sued clauses that examined each charter as a whole—and applied the traditional tools of statutory construction. The presence of the term "federal court" is relevant, but alone does not grant jurisdiction.

Here, Congress's decision to specify that Fannie cannot sue or be sued in any court, unless it is a "court of competent jurisdiction," confirms that Congress did not intend to give the federal courts the authority to hear any case—however trivial, however divorced from federal law, however small the amount in controversy—simply because Fannie is a party. Since the charter in *Red Cross* did not contain such a limitation, that case does not require this Court to ignore the plain language of Fannie's charter. But if this Court concludes that *Red Cross* articulated an "if 'federal' then jurisdiction" rule, it should overrule any such magic-word test in favor of its customary approach to interpreting statutes.

STATEMENT OF THE CASE

This case presents the story of a congressionally chartered entity that was born as a federal agency and converted to a private entity—and the jurisdictional provision that adapted to that transition.

Congress Creates Fannie Mae As A Government-Owned Entity That Could Sue And Be Sued In Federal Court

The story begins with the National Housing Act of 1934, a body of New Deal legislation enacted to buoy the nation's recovery from the housing crisis brought on by the Great Depression. Pub. L. No. 73-479, ch. 847, 48 Stat. 1246. The Act authorized a federal agency to create "national mortgage associations" to purchase and resell mortgage loans in the secondary mortgage market, thereby boosting lender liquidity and increasing the availability of low-cost mortgages to homebuyers. *See* 48 Stat. at 1252-55; Richard W. Bartke, *Fannie Mae and the Secondary Mortgage Market*, 66 N.W. L. Rev. 1, 16-17 (1971).

Thus was born the Federal National Mortgage Association—aka Fannie Mae. Fannie began life as a national association with capital stock owned by the government. *See* HUD, *Background and History of the Federal National Mortgage Association* 7-9, A-4. (1966) [hereinafter *Fannie Background and History*]. Fannie's charter conferred a laundry list of standard corporate powers. One was the capacity "to sue and be sued, complain and defend, in any court of law or equity, State or Federal." 48 Stat. at 1253; *see* Act to Amend the Servicemen's Readjustment Act of 1944, Pub. L. No. 80-864, ch. 784, 62 Stat 1206, 1208 (1948).

At the time, a separate provision governed jurisdiction over any suit involving Fannie. That provision, currently codified as 28 U.S.C. § 1349 (originally 28 U.S.C. § 42), granted district courts jurisdiction

over civil actions involving federally chartered corporations that were more than 50% government-owned (as Fannie then was). Thus, at its inception, Fannie was subject to the full scope of federal court jurisdiction—but not because of its sue-and-be-sued clause. *See* U.S. Cert. Br. 16.

Congress Amends The Sue-And-Be-Sued Provision While Placing Fannie On The Path to Privatization

In 1954, Congress decided to reduce the government's role in the housing market, particularly in the secondary mortgage market. Through this legislation, Congress set Fannie on a path to privatization.

Early on, Fannie's primary purpose was to increase lender liquidity by purchasing and reselling mortgages and issuing bonds to investors, and to promote the construction and financing of new homes by making direct loans secured by federally insured mortgages. *Fannie Background and History*, *supra*, at 10 & n.14. Most of its financing came from the U.S. Treasury. *Id.* at A-10. Contrary to Congress's expectation, however, by 1954 this approach was not spurring private investment in the secondary mortgage market. *See* James R. Hagerty, *The Fateful History of Fannie Mae: New Deal Birth to Mortgage Crisis Fall*, 21-24 (2012). Rather, it deterred private investors who felt ill-equipped to compete with the federal government. *See id.*

At the same time, the public was agitating over the expansion of government-controlled corporations generally. By the end of World War II, there were

nearly 60 public corporations. Their drain on public resources "had gotten out of hand." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 389 (1995); *see* Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 Fla. St. U. L. Rev. 317, 323 (2009).

Government activity in the housing market was a particular target of criticism. After assuming office in 1953, President Eisenhower assembled an advisory committee to "clearly identify the proper role of the Federal Government in the housing field." President's Advisory Committee on Government Housing Policies and Programs: A Report to the President of the United States iv (1953). The committee recommended overhauling the government's involvement in the secondary mortgage market to increase private investment and "operate without expense to the Federal government." *Id.* at 349.

The 1954 legislation split Fannie's "secondary market" functions—through which Fannie increased liquidity in the mortgage market by purchasing mortgages at market price—from other functions that were more governmental in nature.[1] Housing Act of 1954, Pub. L. No. 83-560, ch. 647, § 301, 68 Stat. 590, 612-13. Congress directed Fannie to eventually trans-

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[1] The more governmental functions were: (1) "special assistance," which involved acquiring and securitizing mortgages that were "not necessarily readily acceptable to [private] investors," § 305, 68 Stat. at 616-17; and (2) "management and liquidat[ion]" of Fannie's portfolio of assets and liabilities acquired up to 1954, § 306, 68 Stat. at 618-19; *see* Hagerty, *supra*, at 31-33.

fer the secondary market functions to private investors. *See* § 303, 68 Stat. at 615. The goal was that "the Government investment in [Fannie] would gradually be replaced by private investment funds," making Fannie a private entity. H.R. Rep. No. 83-2271, at 81 (1954) (Conf. Rep.).

The privatization would eventually alter the jurisdictional regime governing Fannie. Once private investors owned 50% or more of Fannie's stock, the district courts would no longer have automatic jurisdiction under § 1349. Unless Fannie's charter itself expressly conferred jurisdiction, the general rules governing the authority of the federal courts (e.g., diversity and federal question jurisdiction) would govern.

In the same legislation that set Fannie on the path to privatization, Congress amended the sue-and-be-sued clause in Fannie's charter as follows: "[Fannie] shall have power to ... sue and ***to*** be sued, ***and to*** complain and ***to*** defend, in any court of ~~law or equity~~ ***competent jurisdiction***, State or Federal." *Compare* 48 Stat. at 1253, *with* § 309, 68 Stat. at 620. The resulting language remains in place today. 12 U.S.C. § 1723a(a).

Fannie Achieves Its Status As A Private Corporation

More than a decade later, the privatization was falling short of expectations: Private lenders had purchased only small amounts of Fannie's common stock. *See* H.R. Rep. No. 90-1585, at 68 (1968); Hagerty, *su-*

pra, at 32. Completing the transition had become urgent. A proposed revision of federal budgetary practices would include the debts of agencies like Fannie in the federal budget. The administration worried that including Fannie's substantial debt on the government's ledger would alarm the public. Hagerty, *supra*, at 35-37. President Johnson urged Congress to take more urgent steps to "transfer [Fannie's] secondary market operation ... to completely private ownership." A Message on Housing and Cities from the President of the United States, H.R. Doc. No. 90-261 at 13 (1968). Congress obliged in a statute directing Fannie to retire its government-held stock and transfer Fannie to private ownership "as rapidly as possible." Federal National Mortgage Association Charter Act Amendments, Pub. L. No. 90-448, § 802(i)(6), 82 Stat. 536, 537 (1968); 68 Stat. at 613.

To formally separate the to-be-privatized secondary market operations from Fannie's other functions, Congress created a new entity, the Government National Mortgage Association—aka Ginnie Mae. § 802, 82 Stat. at 536 (codified as amended at 12 U.S.C. § 1717). Ginnie, a government-owned corporation within the Department of Housing and Urban Development, assumed Fannie's more governmental functions. § 801, 82 Stat. at 536. By statute, Ginnie and Fannie share the same corporate powers, including the same sue-and-be-sued capacity. 12 U.S.C. § 1723a(a). But unlike Fannie, Ginnie "ha[s] plenary access to the federal courts as an agency of the federal government." Pet. App. 39a (Stein, J., dissenting) (citing 28 U.S.C. §§ 1345, 1346); *see Gov't Nat'l Mortg. Ass'n v. Terry*, 608 F.2d 614, 616 (5th Cir. 1979).

Congress Further Clarifies The Federal Courts' Jurisdiction Over Cases Involving Fannie

In 1974, Congress made another amendment to Fannie's charter, this one relating specifically to "jurisdiction." By then, Fannie's privatization was complete; the government no longer held Fannie stock. *See* 116 Cong. Rec. 23,996, 23,997 (July 13, 1970) (letter from Assistant Attorney General William H. Rehnquist to HUD Under Secretary Richard C. Van Dusen) [hereinafter Rehnquist letter]. That meant that litigation involving Fannie was no longer subject to automatic federal jurisdiction under § 1349. A natural question, then, was how to treat Fannie for purposes of diversity. Under 28 U.S.C. § 1332, a corporation is a citizen of its state of incorporation and where it has its principal place of business, but at the time, federally chartered corporations were not considered "citizens" of any "State" for the purposes of § 1332. Pet. App. 38a (Stein, J., dissenting) (citing *Bankers' Tr. Co. v. Tex. & Pac. Ry. Co.*, 241 U.S. 295, 309-10 (1916); *Hancock Fin. Corp. v. Fed. Sav. & Loan Ins. Corp.*, 492 F.2d 1325, 1329 & n.4 (9th Cir. 1974)).

The 1974 amendment changed that for Fannie. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 806(b), 88 Stat. 633, 727 (codified as amended at 12 U.S.C. § 1717(a)(2)(B)); Pet. App. 38a. The charter previously required Fannie "to maintain [its] principal office in the District of Columbia," and provided that Fannie "shall be deemed, for purposes of venue in civil actions, to be a resident thereof." Pet. App. 37a (citation omitted). Congress revised the clause to permit Fannie to maintain its office in the District of Columbia "or the metropolitan

area thereof," and provided that Fannie "shall be deemed, for purposes of *jurisdiction* and venue in civil actions, to be a District of Columbia corporation." § 806(b), 88 Stat. at 727 (emphasis added); Pet. App. 37a-38a. By specifying Fannie's citizenship, Congress made diversity jurisdiction possible.

Though Congress took similar action with respect to national banking associations, Pet. App. 38a-39a, it did not make the same amendment to Ginnie's charter. Ginnie's status as a wholly owned government entity confers automatic jurisdiction on the federal courts, and it has "no use for diversity jurisdiction." Pet. App. 39a.

Petitioners Bring State Law Claims Against Fannie And Fannie Removes

In 2002, Petitioners Crystal Lightfoot and Beverly Hollis-Arrington initiated this litigation, pro se, by filing state law claims related to the foreclosure of their home against Respondents in California state court. JA 27-58. Fannie removed to federal court, arguing that its charter automatically confers subject matter jurisdiction on the federal district courts over all suits to which Fannie is a party. Pet. App. 45a-49a.

Petitioners moved to remand to state court, on the ground that Fannie's charter provides no basis for jurisdiction in federal court. JA 59-62. The district court denied the motion. Pet. App. 43a-44a. While briefing on the remand issue was ongoing, Respondents moved to dismiss the case on res judicata and collateral estoppel grounds in light of prior federal court litigation.

JA 17. The district court granted the motion as to Respondents Fannie and Cendant Mortgage Corporation. JA 80-84.

Petitioners filed a motion to set aside the judgment, which the district court denied and the Ninth Circuit summarily affirmed. JA 87-94, 111-12. Petitioners subsequently moved the district court to enter final judgment. JA 21. The district court did so consistent with its prior orders granting Respondents' motions to dismiss. JA 21-23. Petitioners then filed a motion to set aside the judgment under Federal Rule of Civil Procedure 60(b). JA 95-110. The district court denied that motion. JA 24-25.

The Ninth Circuit Affirms, Holding That Fannie's Charter Confers Federal Jurisdiction

Petitioners (still pro se) appealed, arguing that the district court lacked subject matter jurisdiction because Fannie's charter does not automatically confer it. JA 25. The Ninth Circuit initially affirmed, reasoning that the district court had jurisdiction "because state claims filed to circumvent the res judicata impact of a federal judgment may be removed to federal court." *Lightfoot v. Cendant Mortg. Corp.*, 465 F. App'x 668, 669 (9th Cir. 2012). After Petitioners filed a petition for rehearing en banc, the court sua sponte withdrew its disposition, appointed pro bono counsel to represent Petitioners, and ordered briefing on whether Fannie's charter grants the district court automatic federal jurisdiction. Pet. App. 5a.

In the ruling at issue here, a divided panel of the Ninth Circuit held that Fannie's charter confers federal jurisdiction over all cases to which Fannie is a party. Pet. App. 4a. The court invoked *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), for the proposition that if a "specific reference to the federal courts" appears in a sue-and-be-sued charter, then federal jurisdiction exists. Pet. App. 11a. The court did not believe that the evolution of the charter in 1954 and 1974 changed the analysis. Pet. App. 9a-11a, 15a-21a.

In dissent, Judge Stein disagreed with the majority's reading of *Red Cross*, emphasizing that this Court did not announce a "magic-words test" whereby the inclusion of the word "federal" necessarily confers jurisdiction. Pet. App. 25a. Instead, *Red Cross* merely restated a background principle designed to help Congress write—and help courts interpret—sue-and-be-sued clauses. Pet. App. 25a. Turning to Fannie's clause, Judge Stein noted that the "of competent jurisdiction" charter language could only be read to require an independent basis for jurisdiction. Pet. App. 26a-32a. Judge Stein also observed that Congress's effort in 1954 to put Fannie on the path to privatization confirmed that it intended that jurisdiction be governed by the "default rule" in § 1349. Pet. App. 36a & n.5. In addition, he explained that the 1974 amendments clarified Fannie's citizenship for purposes of diversity jurisdiction, and that this clarification would have been "frivolous" had the sue-and-be-sued clause already conferred jurisdiction. Pet. App. 40a.

SUMMARY OF THE ARGUMENT

I. When interpreting a statute, a court must read the text in accord with its plain meaning. The text of Fannie's charter is clear: Fannie has the power to sue and be sued in any state or federal court that otherwise has jurisdiction over the case. Situated among Fannie's corporate powers, the sue-and-be-sued clause is a grant of capacity, not jurisdiction.

Congress made plain its intent not to grant jurisdiction by specifying that Fannie cannot sue or be sued in any court unless it is "of competent jurisdiction"—i.e., the court must have an "outside source[] of jurisdictional authority." *Califano v. Sanders*, 430 U.S. 99, 106 n.6 (1977). Fannie and the Ninth Circuit both admit that this requirement applies to suits involving Fannie in state and specialized federal courts, yet they offer no good reason why it does not likewise apply to suits in federal district court. Congress knows full well how to expressly confer jurisdiction over federally chartered entities—including others that operate in the housing market. There is no reason to read Fannie's charter as implicitly doing so—especially when such a reading would violate the default rule Congress had previously established for conferring jurisdiction over such entities.

Fannie's history and the consequent evolution of its charter confirm what the text already makes plain—that the sue-and-be-sued clause does not confer jurisdiction. Concerned that Fannie's governmental power was undermining the private mortgage market, in 1954 Congress put Fannie on the path to privatization. As part of that legislation, Congress

added the "of competent jurisdiction" language to Fannie's charter, to confirm that, once it was privatized, the federal courts would no longer have automatic jurisdiction over suits involving Fannie under 28 U.S.C. § 1349. Fannie would have to compete on a level playing field just like any other market participant—including in the courts.

Congress erased any doubts about its intentions in 1974, when it further amended Fannie's charter to designate it "a District of Columbia corporation" for "purposes of jurisdiction and venue." Having recently achieved private status, Fannie was no longer subject to automatic federal jurisdiction under § 1349. By clarifying where Fannie was a citizen, Congress ensured that the federal courts could hear suits involving Fannie under their diversity jurisdiction. If Fannie's charter already gave the federal courts automatic jurisdiction, such an amendment would have been unnecessary.

II. In reaching its erroneous conclusion, the Ninth Circuit put the text and evolution of Fannie's charter to the side, and rested its decision instead on the fact that the sue-and-be-sued clause includes the term "federal court." According to the Ninth Circuit, this Court's decision in *Red Cross* adopted a rule making that sufficient to confer jurisdiction.

But neither *Red Cross* nor any other decision of this Court created such a rule. In *Red Cross*, this Court said that a charter "*may* be read to confer federal court jurisdiction *if, but only if*, it specifically mentions the federal courts." 505 U.S. at 255 (emphasis added). In so holding, *Red Cross* relied on this

Court's previous cases, which similarly held that reference to "federal courts" was but one indicator of Congress's jurisdictional intent—a factor to be considered in tandem with the statutory text as a whole, its context, and its history.

The charter at issue in *Red Cross* differs from Fannie's in crucial respects. Most notably, the Red Cross's charter does not include the phrase "of competent jurisdiction" or anything like it. Accordingly, there is nothing in the charter itself suggesting the need for an external basis of jurisdiction. Nor was this Court obliged to read the Red Cross's charter against § 1349's default rule, because that rule did not apply. And while principles of statutory interpretation required this Court to give independent effect to the term "federal court" in the Red Cross's charter, the same principles mandate that "of competent jurisdiction" in Fannie's be treated as more than mere surplusage.

For these reasons, the Ninth Circuit was wrong in believing that *Red Cross* dictated the decision below. But if this Court agrees that *Red Cross* created an "if federal, then jurisdiction" rule, this Court should overrule that decision. Such "magic words" jurisprudence is at odds with how this Court interprets statutes, and is not mandated by this Court's precedent. And while stare decisis generally counsels in favor of preserving precedent, its force is lessened when—as here—the precedent in question generates confusion and threatens absurd results.

III. Reading Fannie's charter in accord with its plain meaning and its history makes sense for an additional reason: avoiding constitutional difficulty. As this Court has recognized, while Congress's jurisdiction-conferring power under Article III is broad, it is not limitless. In particular, this Court has expressed doubt about whether the mere possibility of a federal question arising in a case is constitutionally sufficient to justify "arising under" jurisdiction. As a result, the Court has been reluctant to condone statutes that purport to grant jurisdiction over cases that present no substantive issue of federal law—as the Ninth Circuit has read Fannie's charter to do. Rather than ratify the Ninth Circuit's counter-textual reading of the statute, this Court should sidestep the constitutional problem of Congress's Article III authority and give the charter its plain and natural meaning.

ARGUMENT

I. Fannie's Charter Does Not Confer Jurisdiction.

The Ninth Circuit's decision violates the basic rule of statutory interpretation that, "[i]n determining the meaning of a statutory provision, [courts] look first to its language, giving the words used their ordinary meaning." *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (internal quotation marks omitted). What Fannie's sue-and-be-sued clause says, in plain English, is clear: Fannie can bring claims in court, and claims can be brought against Fannie. 12 U.S.C. § 1723a(a). It does not say that the federal courts automatically have jurisdiction over all those claims.

True, when Congress amended Fannie's charter in 1954 it perhaps had some reason to believe courts might misconstrue the sue-and-be-sued clause as a grant of original federal jurisdiction. But Congress eliminated that possibility by adding the "of competent jurisdiction" language, making it clear that the power to sue and be sued was only that, and not an independent grant of jurisdiction. The Ninth Circuit dismissed that amendment and another as irrelevant, Pet. App. 14a-21a, but it got that wrong too. The plain language of the amendments, and the context in which they were enacted, confirm Congress's intent to require an independent source of federal jurisdiction, so that Fannie, once privatized, would be treated for jurisdictional purposes like any other private corporation. Certainly, nothing in that statutory progression justifies imbuing the statute's language with content that contradicts its plain meaning.

A. The plain language of Fannie's sue-and-be-sued clause does not confer jurisdiction.

1. Fannie's charter grants it "the power ... in its corporate name, to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1723a(a). "Boil[ed] ... down to its relevant syntactic elements," that clause gives Fannie the power to adjudicate disputes in courts that are otherwise jurisdictionally competent to hear them. *Lawson*, 134 S. Ct. at 1165 (internal quotation marks omitted). It does nothing to alter the authority of the federal district courts, nor

does it grant the district courts subject matter jurisdiction over any case involving Fannie, no matter how trivial.

When Congress granted Fannie the "power ... in its corporate name, to sue," it merely gave Fannie the legal capacity to institute a lawsuit in its own name—a capacity it would not otherwise enjoy as a federally chartered entity. *See Bankers' Trust*, 241 U.S. at 308 ("A corporation has no powers and can incur no obligations except as authorized or provided for in its charter." (internal quotation marks omitted)). The power "to be sued" means a corporation can have "legal proceedings [commenced] against" it. *Black's Law Dictionary* 1674 (3d ed. 1933). Congress needed to add that provision because Fannie could have been viewed as a federal agency immune from suit, and, absent strong indication to the contrary. "agencies authorized to 'sue and be sued' are presumed to have fully waived immunity." *FDIC v. Meyer*, 510 U.S. 471, 481 (1994) (internal quotation marks omitted).

Congress placed the sue-and-be-sued clause in the middle of a laundry list of more than a dozen standard corporate powers—none of which has anything to do with the jurisdiction of courts. On one side is the "power to adopt, alter, and use a corporate seal" and "to enter into and perform contracts." 12 U.S.C. § 1723a(a). On the other side is the "power to ... lease, purchase, or acquire any property" and "to accept gifts." *Id.* This list of powers simply reflects Fannie's authority to "do all things as are necessary or incidental to the proper management of its affairs and the proper conduct of its business." *Id.*

Congress's decision to situate the clause in the middle of this list makes sense. When it authorizes a federal entity "to engage in commercial and business transactions" such as those contemplated by the clause, Congress "launche[s] [the] governmental agency into the commercial world." *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940). Like the provisions surrounding it, the sue-and-be-sued clause grants Fannie judicial recourse to enforce its agreements and contracts, just as any business might. At the same time, in providing that Fannie can "be sued," Congress made clear that Fannie—like other governmental entities with similar charters—was "amenable to judicial process [as] a private enterprise under like circumstances would be." *Burr*, 309 U.S. at 245. As it has with numerous other entities, Congress included this clause to place Fannie on "an equal footing with private parties as to the usual incidents of suits." *Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 85-86 (1941).

2. The only reference to "jurisdiction" in Fannie's sue-and-be-sued clause confirms it does not confer any. The charter does not grant Fannie the capacity to sue and be sued in any state or federal court without qualification; it must be a "court of competent jurisdiction." A court of "competent jurisdiction" is one that has "outside sources of jurisdictional authority." *Califano*, 430 U.S. at 106 n.6; *see Black's Law Dictionary* 379, 459 (3d ed. 1933) (defining "competent" to include "[d]uly qualified; answering all requirements," and defining "Court of competent jurisdiction" as "[o]ne having power and authority of law at the time of acting to do the particular act"). As this Court has long recognized, a court of "competent jurisdiction" is

therefore simply a court that has jurisdiction to hear the case. *See, e.g.*, *Ex parte Crouch*, 112 U.S. 178, 180 (1884); *Ex parte Phenix Ins. Co.*, 118 U.S. 610, 617 (1886); *Louisville Tr. Co. v. Knott*, 191 U.S. 225, 234 (1903) (citing *Smith v. McKay*, 161 U.S. 255, 358 (1896)).

In *Shoshone Mining Co. v. Rutter*, this Court rejected the argument that a statute providing for suit "in a court of competent jurisdiction" granted automatic jurisdiction in the federal courts, explaining that the statute's plain language "unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal Courts." 177 U.S. 505, 506-07 (1900). As such, federal jurisdiction was proper only if the party seeking the federal forum established a separate federal question or diversity of citizenship. *Id.* at 507. Like the statute in *Shoshone*, Fannie's charter leaves a court's "competency" in the subject matter "to depend on other provisions of law." *Ex parte Phenix Ins. Co.*, 118 U.S. at 617.

Fannie's sue-and-be-sued clause is different from the one in *Shoshone* in that this one provides for suit "in any court of competent jurisdiction, *State or Federal*." But as a matter of plain English, that cannot make the difference. Fannie concedes that the clause cannot be read as a grant of jurisdiction to any *state* court; a state court cannot take jurisdiction over a Fannie case unless jurisdiction is *otherwise* "competent" in that court. Br. in Opp. 25 n.6; *see* JA 155 ("[L]itigants in state courts ... must satisfy the appro-

priate jurisdictional requirements" (internal quotation marks omitted)). The same must be true of any federal court.

In fact, Fannie concedes that too—at least partially. As Fannie admits, the clause does not mean that Petitioners could have sued Fannie in "any" "Federal" court—say, the Court of Federal Claims. Br. in Opp. 25 n.6. At least in that context, the "Federal" court must be a "court of competent jurisdiction," which can be determined only by reference to some source of jurisdiction outside this clause itself. Fannie has never explained how the same language can be read one way with respect to state courts and specialized federal courts, but another way with respect to federal district courts.

Congress certainly knows how to draft a charter that draws such a distinction. The charter this Court considered in *Osborn v. Bank of the United States* granted the Bank of the United States authority to "sue and be sued" in "State Courts having competent jurisdiction, and *in any Circuit Court of the United States*." 22 U.S. 738, 817 (1824) (emphasis added). But Fannie's charter does not say Fannie may sue or be sued "in state courts and specialized federal courts having competent jurisdiction, and in any district court of the United States." And it would be wrong to read it that way.

3. Congress also knows how to establish an independent basis for jurisdiction over a federal agency or corporation when that is what it wants to do. With respect to a variety of entities, Congress has provided that district courts "shall have jurisdiction," or "shall

have original jurisdiction," over suits involving that entity. *E.g.*, 12 U.S.C. § 1441b(h)(4)(A) (Resolution Funding Corporation); *id.* § 1789(a)(2) (National Credit Union Administration Board); *id.* § 2279aa-14(2) (Federal Agricultural Mortgage Corporation); 15 U.S.C. § 714b(c) (Commodity Credit Corporation); 20 U.S.C. § 1066d(5) (Secretary of Education); *id.* § 1082(a)(2) (Secretary of Education); 42 U.S.C. § 292j(a)(2) (Secretary of Health and Human Services). Importantly, Congress added the express jurisdictional grants in each of these statutes *in addition* to sue-and-be-sued clauses.

In particular, Congress has enacted these kinds of provisions with respect to other federal entities that, like Fannie, operate in the housing market. For example, the statute chartering the Federal Home Loan Mortgage Corporation (Freddie Mac) has a sue-and-be-sued clause, 12 U.S.C § 1452(c), but it also provides that "all civil actions to which [Freddie] is a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such actions, without regard to amount or value," 12 U.S.C. § 1452(f). And it expressly allows Freddie to remove "any" state court action to federal district court. *Id.*

Perhaps even more instructive is the Home Owner's Loan Act of 1933, another New Deal statute that Congress amended in 1954 in the same act that amended Fannie's charter. As amended, the Act granted the Home Loan Bank Board (HLBB) the power to "sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories." § 503(2), 68 Stat. at 635. But

the Act also explicitly provided that "the United States district court[s] ... shall have jurisdiction" to hold hearings and issue declaratory judgments and injunctions in disputes brought by the HLBB against member associations, and to enforce the HLBB's orders. *Id.*

If the sue-and-be-sued clauses in these statutes conferred subject matter jurisdiction by themselves, the express jurisdictional provisions that Congress added would be superfluous. As the Ninth Circuit acknowledged, a statute should be read so that "no part will be inoperative." Pet. App. 12a; *see Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014); *Corley v. United States*, 556 U.S. 303, 314 (2009).

4. Finally, any plain reading of Fannie's sue-and-be-sued clause must account for the default rule Congress established for jurisdiction over corporations like Fannie. Recall that § 1349 provides: "The district courts *shall not have jurisdiction* of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock." 28 U.S.C. § 1349 (emphasis added). Thus, before Fannie was chartered, Congress had already established a rule governing when the federal courts do and do not have jurisdiction with respect to actions by or against a federally chartered corporation.

If Congress intended to deviate from that baseline rule, it would have said so clearly. In fact, it expressly did so in Freddie's charter. It specified that "[n]otwithstanding section 1349 of title 28," Freddie is an

"agency" for purposes of 28 U.S.C. §§ 1345 and 1442, which grant the federal courts jurisdiction over suits involving the United States and its agencies and officers. 12 U.S.C. § 1452(f); *see id.* § 2279aa-14 (same for the Federal Agricultural Mortgage Corporation). At a minimum, if Congress saw Fannie's sue-and-be-sued clause as a grant of jurisdiction, it would have prefaced the grant with similar "notwithstanding" language.

This premise seems especially apt in light of § 1349's origins. The impetus for § 1349 was an opinion from this Court holding that federal question jurisdiction under § 1331 extended to all litigation involving federally chartered entities. *See Pacific R.R. Removal Cases*, 115 U.S. 1, 11 (1885). That meant federal courts had automatic jurisdiction over any suit involving a company with a federal charter, even if the company had no other involvement with, or ownership by, the government. The consequence was a "flood of litigation" that just did not belong in federal court. *Murphy v. Colonial Fed. Sav. & Loan Ass'n*, 388 F.2d 609, 612 (2d Cir. 1967) (internal quotation marks omitted). Congress thought it essential to "wipe[] out th[e] unfortunate decision." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 n.50 (1959). So in 1925, just a few years before creating Fannie, Congress passed § 1349 to keep lawsuits just like this one out of federal court. Judiciary Act of 1925, Pub. L. No. 68-415, ch. 229, § 12, 43 Stat. 936, 941.

At the same time, Congress gave no indication—and has not since—that it wanted jurisdiction over a publicly traded corporation to depend on the presence of the term "federal court" in its sue-and-be-sued

clause. In adopting that view, the Ninth Circuit improperly substituted its own default interpretive rule for the one Congress enacted.

B. The evolution of Fannie's charter confirms Congress did not intend to confer jurisdiction.

The evolution of Fannie's charter, consistent with its plain meaning, confirms that Congress intended to require an independent source of federal court jurisdiction with respect to suits involving Fannie. When Congress set Fannie on the path from full federal ownership toward private ownership, it simultaneously amended Fannie's charter to explicitly require an outside basis of federal jurisdiction. § I.B.1. Then, in 1974, after the shift was complete, Congress further amended the charter to provide litigants with access to the federal courts through diversity jurisdiction. § I.B.2.

1. The 1954 Amendments added "of competent jurisdiction" because Congress wanted Fannie to be treated like a private enterprise.

a. As explained above (at 6-7), when Fannie was first created it was a wholly owned government entity. But in 1954, to moderate the government's heavy influence in the secondary mortgage market, Congress set Fannie on a path to privatization. The Housing Act of 1954 rechartered Fannie as a mixed-stock corporation and separated Fannie's secondary mortgage market operations from its other functions, providing a path by which Fannie's lenders would

take full control and ownership of its secondary mortgage business. *See* H.R. Rep. No. 83-1429, pt. 1, at 1-2 (1954); §§ 302-306, 68 Stat. at 613-19.

This transition would necessarily have an impact on federal jurisdiction. Under § 1349, jurisdiction was no longer automatic once the government's ownership stake in Fannie dipped below 50%. At that point, if Congress wanted federal courts to have automatic jurisdiction over any litigation involving Fannie, the charter would have to say so. But all indications are that Congress wanted no such thing; it wanted Fannie, once privatized, to be treated as any other private entity.

The original language of Fannie's charter did not clearly confer jurisdiction, but intervening case law raised the prospect that courts might interpret the sue-and-be-sued clause as doing so. In 1942—after Congress enacted Fannie's charter, but before the 1954 amendments—this Court suggested in *D'Oench, Duhme & Co. v. FDIC* that the district court's jurisdiction in that case was based on a statute granting the Federal Deposit Insurance Corporation the power to "sue or be sued 'in any court of law or equity, State or Federal.'" 315 U.S. 447, 455 (1942). As discussed more fully below (at 45-47), jurisdiction was not at issue in *D'Oench*, and in any event, the Court noted that another provision in the statute expressly conferred jurisdiction, *id.* at 456 n.2. But because Fannie's sue-and-be-sued provision at the time was substantially similar to the FDIC's, Congress could have anticipated that courts might read Fannie's charter to confer federal jurisdiction—if it did not change the language.

Tellingly, Congress did not maintain that language, but instead amended Fannie's sue-and-be-sued clause to its present formulation. Specifically, Congress replaced "law and equity" with "competent jurisdiction," authorizing Fannie "to sue and to be sued, and to complain and to defend, in any court of *competent jurisdiction*, State or Federal." § 309, 68 Stat. at 620 (emphasis added).

This would be the natural way to clarify that Congress did not want Fannie to have automatic jurisdiction in federal courts in perpetuity. As noted above (at 21-23), long before 1954, this Court had held that a court of "competent jurisdiction" is one whose jurisdiction "depend[s] on other provisions of law." *Ex parte Phenix*, 118 U.S. at 617. Congress's word choice clarified that, once private investors acquired a controlling stake in Fannie, the corporation would be subject to federal court jurisdiction only in such courts as otherwise had subject matter jurisdiction.

b. The Ninth Circuit gave three reasons for rejecting this account of the change. None is persuasive.

The Ninth Circuit's first argument was about the dog that didn't bark. It pointed out that the legislative history is "silent" about the addition of the "of competent jurisdiction" language. Pet. App. 9a-10a. In its view, if Congress in 1954 had intended to impose a "severe new restraint" on the federal courts' jurisdiction, it would not have done so quietly. *Id.*

But the "restraint" on jurisdiction was neither "severe" nor "new." As demonstrated above (at 18-21), the original "sue-and-be-sued clause" did not confer

jurisdiction. Because the 1954 amendment merely clarified the status quo, there was nothing "new" to debate. But even if Congress had thought otherwise, the 1954 amendments worked no dramatic change—and certainly nothing Congress would have viewed as "severe." Congress knew that federal courts would continue to have jurisdiction over suits involving Fannie for quite some time—by dint of § 1349. The 1954 amendments set Fannie on a "gradual[]" path to privatization that, when achieved, would tip Fannie beyond 50% private ownership. H.R. Rep. No. 83-2271, at 81. But Fannie would not achieve that status until 1970, after Congress enacted further legislation to accelerate the process. *See* § 802, 82 Stat. at 536-42; Rehnquist letter, 116 Cong. Rec. at 23,997.

Moreover, even if the 1954 amendment did represent a pronounced jurisdictional shift, Congress might well have been silent anyway. As the Ninth Circuit acknowledged, in the same legislation Congress amended the Federal Savings and Loan Insurance Corporation's charter to require an independent source of jurisdiction. Pet. App. 16a-17a. This change came with no debate and no explanatory statement in the legislative history. *Id.* (citing H.R. Rep. No. 83-1429, at 90-91 (1954); S. Rep. No. 83-1472, at 121-22 (1954)). If the dog didn't bark there, nothing can be discerned from its silence here. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark").

Finally, the premise fails here for a more fundamental reason: Dogs were in fact barking all over the

place. The "court of competent jurisdiction" language was incident to a broader overhaul of Fannie that the reviewing Senate Committee hotly opposed. It thought the House's proposed changes were unnecessary, and recommended only minor alterations to Fannie's charter. S. Rep No. 83-1472 at 33, 74-75 (1954). Notably, the Senate version of the bill, which the Conference Committee rejected, did not include the "of competent jurisdiction" language. *Id.* at 74-75, 121. There would have been no reason for the Senate to oppose that language if the drafters believed it permitted the district courts to exercise jurisdiction over all of Fannie's disputes even after Fannie became private; the Senate wanted Fannie to continue to be treated as a federal agency, which included agency-like access to the federal courts.

The Ninth Circuit's second argument was that, if Congress in 1954 was trying to require an independent basis for federal jurisdiction, it had a better way: It could have eliminated the word "federal," rather than adding "of competent jurisdiction." Pet. App. 11a-12a. The Ninth Circuit believed that "federal" was "the very word[] the Court had recently held sufficient to *confer* such jurisdiction in *D'Oench*." *Id.* at 11a.

But nothing in *D'Oench* indicated that removing "federal" was the only—or even the best—way to achieve that result. In fact, that fix would not have worked in *D'Oench*. Completely apart from the sue-and-be-sued clause, the statute there provided that suits involving the FDIC "'shall be deemed to arise under the laws of the United States.'" 315 U.S. at 455-56 & n.2 (quoting 12 U.S.C. § 264(j)). So removing

"federal" from the FDIC's sue-and-be-sued clause would not have eliminated federal jurisdiction. It would have been more reasonable for Congress in 1954 to conclude that inserting "court of competent jurisdiction" was the best way to distinguish Fannie's charter from one that explicitly conferred federal jurisdiction, by underscoring the need for an *independent* basis for jurisdiction. *See supra* 28-29.

As demonstrated more fully below (at 43-47), the Ninth Circuit was also wrong in suggesting that this Court's case law before *D'Oench* treated "federal" as a "magic word." Pet. App. 25a (Stein, J., dissenting). *Bankers' Trust*, for example, held that a charter conferring the power "to sue and be sued ... in all courts of law and equity within the United States" did not confer jurisdiction. 241 U.S. at 303-05. At no point in its analysis did this Court mention that the statute did not refer to federal courts. Rather, that opinion gave Congress reason to use the words it did here: This Court determined the clause did not contemplate original jurisdiction because its plain meaning only "render[ed] th[e] corporation capable of suing and being sued by its corporate name in any court ... whose jurisdiction *as otherwise competently defined* was adequate to the occasion." *Id.* at 303 (emphasis added).

Contrary to the Ninth Circuit's view, Congress had every reason to think that, by referring to federal and state courts in the undifferentiated manner in which it did, ordinary jurisdictional rules would apply in both. It need have looked no further than this Court's 1900 decision in *Shoshone*, which held that a statute that provided for suit "in a court of competent

jurisdiction" and did not "in express language prescribe either a Federal or a state court" did not provide automatic federal jurisdiction. *Shoshone* explained that Congress does not silently create "new rule[s] of demarcation between the jurisdiction of the Federal and state courts." 177 U.S. at 506. As *Shoshone* reasoned, "[i]f [Congress] had intended that the jurisdiction should be vested only in the Federal courts, it would undoubtedly have said so." *Id.* at 506-07.

Equally unavailing is the Ninth Circuit's third rationale for why the "of competent jurisdiction" language does not preclude its reading of Fannie's charter. Rather than give that phrase meaning, the Ninth Circuit concluded that substituting it for "law or equity" is "best explained as getting rid of [an] anachronism" that remained after the Federal Rules of Civil Procedure merged law and equity in the federal courts in 1938. Pet. App. 10a; *see* Fed. R. Civ. P. 2 ("There is one form of action—the civil action.").

The problem is that the changed language applied equally to "any court ... State or Federal." Although law and equity merged in the *federal* courts, that was not (and even now is not) true in all state courts. T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 Am. Bus. L.J. 455, 456 n.5, 509 (2008). For similar reasons, the Ninth Circuit's example of Congress's supposed cleanup of "law or equity" throughout the U.S. Code is inapt. The court pointed to a 1948 Act amending some provisions of Title 28, which governs the *federal* judiciary, to replace references to federal suits at law or equity with the phrase "civil actions." *See* Pet. App.

10a (citing Act to Revise, Codify and Enact Into Law Title 28 of the United States Code, Pub. L. No. 80-773, §§ 1332, 1343, 1345-46, 62 Stat. 869, 930-33; H.R. Rep. No. 80-3214, at A115, A121, A123 (1948)). But Congress has amended other sections of the U.S. Code that, like Fannie's charter, speak to suits in *state* court, without removing references to law or equity.[2] Sometimes, Congress has even *added* the phrase "court of law or equity."[3]

Even if the Ninth Circuit were right about Congress's purpose of removing references to "law or equity," that only explains why it deleted that phrase from the charter, not why it replaced it with "of competent jurisdiction." The Ninth Circuit posited that Congress may have thought it needed that phrase to

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[2] *See, e.g.*, 12 U.S.C. § 24 (Federal Banks) (amended in 1949 and 1954, *see* Pub. L. No. 81-142, 63 Stat. 298, 298; Pub L. No. 83-630, ch. 834, § 2, 68 Stat. 770, 771); 12 U.S.C. § 341 (Federal Reserve Banks) (amended in 1994, *see* Pub. L. No. 103-325, § 602g(1), 108 Stat. 2160, 2293); 12 U.S.C § 614 (Corporations to do foreign banking) (amended in 1978, *see* Pub. L. No. 95-369, § 3(c), 92 Stat. 607, 609). Indeed, Congress amended the Red Cross's charter itself in 1947, just one year before the Title 28 amendment cited by the Ninth Circuit. *Red Cross*, 505 U.S. at 251-52. Yet Congress did not remove the phrase "courts of law and equity," which is still in the charter today. 36 U.S.C. § 300105(a)(5).

[3] *See, e.g.*, 12 U.S.C. § 1789 (National Credit Union Administration Board) ("court of law or equity" added in 1970, *see* Pub. L. No. 91-468, § 209(a)(2), 84 Stat. 994, 1014); 12 U.S.C. § 1819 (FDIC) ("court of law or equity" added in 1950, *See* Pub. L. No. 81-797, § 9, 64 Stat. 873, 881); 12 U.S.C. § 2277a-7 (Farm Credit System Insurance Corporation) ("court of law or equity" added in 1988, *see* Pub. L. No. 100-233, § 5.58(4)(A), 101 Stat 1568, 1614).

require otherwise competent state courts to hear claims involving Fannie in light of *Testa v. Katt*, 330 U.S. 386 (1947); Pet. App. 13a. *Testa* held that a Rhode Island court could not refuse to hear a claim brought under the federal Emergency Price Control Act, which authorized suits "in any court of competent jurisdiction." 330 U.S. at 387, 393-94. But that case stands only for the proposition that state courts of otherwise competent jurisdiction cannot refuse on policy grounds to hear suits arising under federal law. *See id.* This Court in no way suggested the state courts' obligation to adjudicate the federal claim turned on the statute's reference to courts "of competent jurisdiction."

2. The 1974 Amendments added a basis for diversity jurisdiction, which would have been unnecessary if federal jurisdiction was automatic in all of Fannie's cases.

If the 1954 amendment left any doubt about Congress's intention, Congress erased it in 1974, confirming that an outside source of jurisdiction is needed. That year, Congress amended Fannie's charter again—this time, to specify that Fannie is "a District of Columbia corporation" for "purposes of jurisdiction and venue." § 806(b), 88 Stat. at 727 (codified as amended at 12 U.S.C. § 1717(a)(2)(B)).

This change clarified Fannie's citizenship for purposes of diversity jurisdiction. *See* Pet. App. 38a (Stein, J., dissenting). Fannie had recently achieved private status, *see* Rehnquist letter, 116 Cong. Rec. at 23,997; under § 1349, the federal courts no longer had

automatic jurisdiction over litigation matters involving Fannie. It was theoretically subject to federal diversity jurisdiction, but its citizenship for such purposes was unclear. Federal law deems a corporation a citizen "of every State ... by which it has been incorporated and of the State ... where it has its principal place of business," 28 U.S.C. § 1332(c)(1), but federally chartered corporations are not "incorporated" in any "State," *see Wachovia Bank v. Schmidt*, 546 U.S. 303, 306 (2006), and Congress wanted to allow Fannie to move its principal office to the suburbs, *see* Subcomm. on Hous. of the Comm. on Banking and Currency, 93d Cong., Compilation of the Housing and Community Development Act of 1974, at 379 (Comm. Print 1974). Further, the growing consensus among courts at the time was that federally chartered corporations were "national" citizens and ineligible for diversity jurisdiction unless their activities were concentrated in a particular state. *See, e.g., FDIC v. Nat'l Sur. Corp.*, 345 F. Supp. 885, 887 (S.D. Iowa 1972) (holding that the FDIC is a national citizen only); Lund, *supra*, at 337-48.

As it did with the charters of several other federally chartered corporations, Congress therefore amended Fannie's charter to clarify that Fannie was eligible for diversity jurisdiction. *See* Lund, *supra*, at 353 (citing amendments to several other charters for purposes of clarifying those entities' citizenship for diversity purposes). The amended charter provides that Fannie is "a District of Columbia corporation," and therefore a District of Columbia citizen under § 1332(c)(1) eligible for diversity jurisdiction. *See* Pet. App. 40a.

This amendment would have been pointless if the federal courts already had automatic jurisdiction via Fannie's charter. As if to prove the point, Congress made no parallel change to Ginnie Mae's charter. Unlike Fannie, Ginnie is a government agency and therefore has "no use for diversity jurisdiction." Pet. App. 39a.

Nevertheless, the Ninth Circuit concluded that when the 1974 amendments used the word "jurisdiction," it clarified Fannie's citizenship only for purposes of personal jurisdiction and not for subject matter jurisdiction. Pet. App. 19a-21a. That argument is unconvincing, and Fannie itself seems to be unpersuaded. It has repeatedly argued—even *after* it filed its supplemental cert-stage opposition in this case—that § 1717(a)(2)(B)'s reference to Fannie as a District of Columbia corporation refers to Fannie's citizenship for purposes of diversity jurisdiction. *See* Notice of Removal at 3-4, *Borunda v. Fannie Mae*, 3:16-cv-204-PRM (W.D. Tex. Jun. 16, 2016), Dkt. 1 ("Fannie Mae is a citizen of the District of Columbia.... *See* 12 U.S.C. § 1717(a)(2)(B).... Complete diversity therefore exists between the Parties."); Notice of Removal at 5, *Carter v. Fed. Nat'l Mortg. Ass'n*, 8:14-cv-1754-CJC-JCG (C.D. Cal. Nov. 3, 2014), Dkt. 1 ("Because Plaintiff is ... a citizen of California and Defendant is ... a citizen of the District of Columbia, complete diversity of citizenship exists ....").

The vast majority, if not all, of the federal courts that have considered the question have concluded that the District of Columbia corporation clause dictates Fannie's citizenship for diversity jurisdiction. *See, e.g.*, *Hargrow v. Wells Fargo Bank N.A.*, 491 F.

App'x 534, 536 (6th Cir. 2012); *Jeong v. Fed. Nat'l Mortg. Ass'n*, No. A-14-CA-920-SS, 2014 WL 5808594, at *2 (W.D. Tex. Nov. 7, 2014); *Fed. Nat'l Mortg. Ass'n v. Davis*, 963 F. Supp. 2d 532, 535 n.2 (E.D. Va. 2013).

Further, Congress has used the same "jurisdiction and venue" language in other statutes where that language "indisputably pertains to the [subject matter] jurisdiction of the courts." *United States v. Miranda*, 780 F.3d 1185, 1196 (D.C. Cir. 2015) (citing 7 U.S.C. § 941; 28 U.S.C. § 1370; 40 U.S.C. § 123). To be sure, "jurisdiction and venue" may refer to personal jurisdiction *in addition* to diversity jurisdiction. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). But if Congress intended to refer only to personal jurisdiction, it would not have used a word that encompasses both personal and subject matter jurisdiction.

The better reading—the one that aligns with the text of Fannie's charter as well as its history—is that the "sue-and-be-sued" clause does not confer subject matter jurisdiction on the federal courts.

II. *Red Cross* Does Not Support Interpreting Fannie's Charter To Confer Jurisdiction.

The Ninth Circuit majority did not start with the plain language of Fannie's sue-and-be-sued clause. It read this Court's opinion in *Red Cross* to require any court construing such a clause to dispense with the traditional approach to statutory interpretation in favor of a talismanic rule that revolves around the word "federal"; if found, then the charter confers jurisdiction, and no further analysis is necessary. Pet. App. 11a. The Ninth Circuit saw this as a "clear rule for

construing sue-and-be-sued clauses for federally chartered corporations," Pet. App. 5a—a rule that "resolves this case," Pet. App. 8a, and presumably any other case about jurisdiction under any charter.

That is wrong. *Red Cross* did not adopt a magic-word test. § II.A. To the contrary, this Court examined various indicia in the text and history of the Red Cross's charter—all of which point in the opposite direction here. § II.B. If, however, this Court concludes that *Red Cross* did adopt a magic-word test, it should overrule that decision. § II.C.

A. Neither *Red Cross* nor other precedents articulated an "if federal, then jurisdiction" rule.

1. Contrary to the Ninth Circuit's opinion, *Red Cross* did not announce an "if federal, then jurisdiction" rule. This Court said that "the rule" it drew from its precedents was that "a congressional charter's 'sue and be sued' provision *may* be read to confer federal court jurisdiction *if, but only if*, it specifically mentions the federal courts." 505 U.S. at 255 (emphasis added). There is a big difference.

Embedded in this formulation are two principles: "[O]nly if" means that a court *may not* read a clause to confer federal jurisdiction unless the phrase "federal court" appears in the text. But "if" the provision "mentions the federal courts," a court "*may*" read it as conferring federal jurisdiction—"may," not must. Here, as in any other exercise in statutory interpretation, the rest of the words in the clause matter. Simply

put, the word "federal" is necessary, but not sufficient, to confer federal jurisdiction.

This rule make sense. The federal courts are courts of limited jurisdiction, having only the jurisdiction that Congress grants them. *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013). At minimum, therefore, a sue-and-be-sued clause—which is not the place one would normally look for a jurisdictional provision—cannot confer authority on the federal courts unless it refers to them by name. To hold otherwise would mean that Congress could create federal jurisdiction by accident.

Conversely, the idea that a reference to "federal courts" necessarily translates into federal jurisdiction regardless of the clause's actual wording makes no sense. That is just not how this Court interprets statutes. And it would yield absurd results. Take the hypothetical that Judge Brown of the D.C. Circuit proffered: a charter that reads "Fannie Mae may sue and be sued in federal court *only if* another statute independently confers subject-matter jurisdiction." Under the Ninth Circuit's approach, that charter would have to be read to confer jurisdiction, even though the text unambiguously says just the opposite. *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. ex rel. Fed. Nat'l Mortg. Ass'n v. Raines*, 534 F.3d 779, 795 (D.C. Cir. 2008) (Brown, J., concurring). That obviously cannot be correct. As Judge Brown noted, this hypothetical statute is functionally identical to Fannie's charter, whose plain text requires an independent basis for federal jurisdiction. *Id.* at 799. The Ninth

Circuit's "if federal, then jurisdiction" rule contravenes basic logic, basic statutory construction, and this Court's precedents.

Despite all this, the Ninth Circuit erroneously read *Red Cross* as standing for the rule that "a specific reference to the federal courts [i]s 'necessary *and sufficient* to confer jurisdiction.'" Pet. App. 11a (quoting *Red Cross*, 505 U.S. at 252) (emphasis added). That is not what this Court said in the sentence the Ninth Circuit partially quoted—or anywhere else.

The sentence in question is in the opening paragraph of the legal analysis. 505 U.S. at 252. The paragraph begins, "[W]e do not face a clean slate." *Id.* Next comes the sentence in question, which notes that "we have had several occasions to consider whether the 'sue and be sued' provision of a particular federal corporate charter conferred original federal jurisdiction over cases to which that corporation was a party," and observes:

> our readings of those provisions not only represented our best efforts at divining congressional intent retrospectively, but have also placed Congress on prospective notice of the language necessary and sufficient to confer jurisdiction.

Id. That sentence does not say that this Court's precedents stand for the proposition that a simple reference to "federal court" would be "sufficient to confer jurisdiction." The paragraph does not even mention that some of the clauses use the word "federal" or suggest any rule at all (as the opinion later did in the "if,

but only if" sentence). And it certainly did not suggest that the meaning revolves around a single word. To the contrary, the Court talked about using its "best efforts at divining congressional intent." *Id.* And the paragraph concluded, "Those cases therefore require visitation with care." *Id.*

The opinion proceeded to do exactly that. It considered each prior precedent. *Id.* at 252. It did not describe a single one of them as suggesting that the word "federal" is sufficient to confer federal jurisdiction. It then declared the "if, but only if" "rule" quoted above. *Id.* at 255. Even then, this Court proceeded to apply all the traditional tools of statutory construction—assessing the evolution of the clause, *id.* at 263, and evaluating legislative history, *id.* at 261-62. Ultimately, this Court held that the clause in question granted federal jurisdiction largely because Congress chose text that was "in all relevant respects identical to one on which we based a holding of federal jurisdiction just five years before" in *D'Oench*. *Id.* at 257.

Had "federal" carried the talismanic significance the Ninth Circuit attributed to it, *Red Cross* would have been a much shorter opinion.

2. It would have been quite a departure for *Red Cross* to adopt a magic-word approach, since the line of cases it considered supports no such rule. Those decisions stand only for the principle that courts should read sue-and-be-sued clauses using all the normal interpretive tools available, including the provision's plain language, context, and history. Applying those tools, prior to *Red Cross* the Court had only once held

that a sue-and-be-sued clause conferred jurisdiction—back in 1824.

Deveaux. *Red Cross* began its analysis with *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809). Giving the statute in that case its ordinary meaning, the Court held that a grant of power to the Bank of the United States "to sue and be sued ... in courts of record, or any other place whatsoever" did not "enlarge the jurisdiction of any particular court," but instead simply "give[s] a capacity to the corporation to appear, as a corporation, in any court." 9 U.S. at 85-86. The Court further reasoned that the opposite reading was untenable: "If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction, and for all sums however small they may be." *Id.* at 86.

The Court compared this clause to a different part of the statute, which provided that certain actions against the directors of the Bank "may ... be brought ... in any court of record of the United States." An Act to Incorporate the Subscribers of the Bank of the United States, ch. 10, § 7, 1 Stat. 191, 194 (1791). Unlike the "sue-and-be-sued" clause, the Court viewed this officer provision as conferring jurisdiction. 9 U.S. at 86. But not because it mentioned "any court of record of the United States." Rather, because its authorization of a particular cause of action to be pursued in the federal courts more naturally spoke to their jurisdiction than a provision discussing the Bank's corporate powers. *See id.; Red Cross*, 505 U.S. at 270 (Scalia, J., dissenting). Nowhere did the Court suggest that the reference to federal courts in one provision of the Act but not the other was dispositive. It

was simply one signal that Congress did not intend the sue-and-be-sued clause to confer jurisdiction. *Deveaux*, 9 U.S. at 86.

Osborn. In *Osborn*, the Court returned to a bank charter (the Second Bank), which granted the power "to sue and be sued ... in all State Courts having competent jurisdiction, and in any Circuit Court of the United States." 22 U.S. at 817. In so doing, the charter treated federal courts and state courts differently: To proceed in state court a party needed to point to some other source of "competent jurisdiction." But that condition did not apply to federal courts hearing suits involving the Bank. The Court concluded that this sue-and-be-sued clause conferred subject matter jurisdiction on the federal courts.

Osborn did not apply any magic-word test. Instead, it concluded that the text of the statute as a whole—"[t]hese words"—could "admit of but one interpretation" and "cannot be made plainer by explanation." *Id.* *Osborn* discussed "the contrast developed [in *Deveaux*] between the first bank charter's 'sue-and-be-sued' provision and its provision authorizing suits against bank officers." *Red Cross*, 505 U.S. at 253. But its analysis never turned on a reference (or lack of reference) to federal courts. Rather, the Court stated that the conclusion that the *Deveaux* sue-and-be-sued clause did not confer jurisdiction was merely "*strengthened* by the circumstance that [another] section of the same act" appeared to confer jurisdiction on federal courts. *Osborn*, 22 U.S. at 818 (emphasis added).

In fact, the only categorical statement in *Osborn* about the importance of "federal courts" was that "a general capacity in the Bank to sue, without mentioning the Courts of the Union, *may not* give a right to sue in those Courts." *Id.* at 818 (emphasis added). In other words, as in *Red Cross*, a specific mention of the federal courts is a necessary condition for jurisdiction, not a sufficient one.

Bankers' Trust. The Court next took up a sue-and-be-sued clause nearly a century later in *Bankers' Trust Co. v. Texas & Pacific Railway Co.*, 241 U.S. 295 (1916). The provision at issue gave Texas & Pacific Railway the power "to sue and be sued ... in all courts of law or equity within the United States." *Id.* at 303. The Court did not mention the absence of any reference to federal courts in its analysis. Rather, it again deployed traditional interpretive tools. The Court began its analysis with the clause's "context," and concluded that, if Congress had intended to confer jurisdiction, it "would have expressed that purpose in altogether different words." *Bankers' Trust*, 241 U.S. at 303. The Court also compared the clause before it to the clauses at issue in *Deveaux* and *Osborn*, and concluded that it was closer to the *Deveaux* clause because it reflected both the same "generality" and "natural import." *Id.* at 304.

D'Oench. Though the majority and dissent in *Red Cross* devoted significant attention to *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), that case was not even about jurisdiction—much less about what language in a sue-and-be-sued clause creates jurisdiction. The ultimate question before the Court was whether federal or state substantive law applied. *Id.*

at 455. The passage on which the *Red Cross* Court focused appeared as part of a brief digression about what turned out to be an academic question: whether Missouri or Illinois law might apply, which in turn depended on which state's choice of law rules were applicable. Specifically, at the time, it was unclear which state's choice of law rules applied when (1) a case involved state substantive law *and* (2) federal jurisdiction was not based on diversity. *Id.* at 455-56.

The Court found that the second condition was met, since jurisdiction was not based on diversity. *Id.* at 455. The Court then stated that the plaintiff "br[ought] this suit under an Act of Congress authorizing [the FDIC] to sue and be sued 'in any court of law or equity, State or Federal,'" while noting that the same part of the statute provided that "[a]ll suits of a civil nature at common law or in equity to which the [FDIC] shall be a party shall be deemed to arise under the laws of the United States," *id.* at 455 & n.2. The Court also cited the prior version of § 1349. *Id.* at 456; *see D'Oench, Duhme & Co. v. FDIC*, 117 F.2d 491, 492 (8th Cir. 1941) (also citing 28 U.S.C. § 42). In short, the plaintiff *brought suit* under the charter's sue-and-be-sued clause, but the district court had *jurisdiction* under 28 U.S.C. §§ 1331 and 1349. *See Red Cross*, 505 U.S. at 274 (Scalia, J., dissenting) ("[T]he complaint in *D'Oench, Duhme* expressly predicated jurisdiction on the fact that the action was one 'aris[ing] under the laws of the United States.'"). At a minimum, the Court articulated multiple possible bases for federal jurisdiction over the FDIC's lawsuit.

The Court concluded, however, that it "need not decide" the choice of law question (and hence the jurisdictional question) because the first condition was not met: federal, not state, substantive law was at issue. *Id.* at 456. The issue of Missouri versus Illinois law, the basis for federal jurisdiction, and the meaning of the sue-and-be-sued clause were therefore irrelevant to the question presented. Tellingly, the Court did not discuss *Deveaux*, *Osborn*, or *Bankers' Trust*—something it would certainly have done had the jurisdictional implications of the sue-and-be-sued clause been at issue.

Against this backdrop, it seems highly unlikely that Congress relied on *D'Oench* when it amended the Red Cross's sue-and-be-sued clause in 1947. Congress would not craft a sue-and-be-sued clause in light of ambiguous statements in a case that had nothing to do with such clauses, let alone pick out of that opinion a single word—"federal"—and decide to hinge jurisdiction on that term. The parties in *Red Cross* cited no evidence that Congress has *ever* based a construction of a sue-and-be-sued clause on *D'Oench*—because it never has. And even if Congress was looking at *D'Oench*, it likely would not have used the sue-and-be-sued clause on its own, but the full provision deeming all cases where the FDIC is a party to "to arise under the laws of the United States."

In sum, the entire course of this Court's precedents on sue-and-be-sued clauses belies any talismanic rule that mentioning the word "federal" is enough to grant jurisdiction.

B. The text, context, and history of the Red Cross's charter are materially different from Fannie's.

Treating *Red Cross* as a precedent to be assessed on its own facts, rather than as a command to apply a magic-word test, leads to reversal here. The Red Cross's charter differs from Fannie's in text, context, and evolution.

The most basic distinction between the two charters is the plain language—specifically, that Fannie's charter requires a "court of competent jurisdiction," whereas the Red Cross's does not. Under *Red Cross*'s own reasoning, this difference is key. As indicated above (at 45-47), the linchpin of the Court's decision in *Red Cross* was a comparison between the Red Cross charter and the statute at issue in *D'Oench*. The Red Cross charter grants the power "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." *Red Cross*, 505 U.S. at 248. In *D'Oench*, the statute at issue likewise granted the FDIC the "power '[t]o sue and be sued, complain and defend, in any court of law or equity, State or Federal." *D'Oench*, 315 U.S. at 467 n.4 (1942). It was because the two were "in all relevant respects identical" that this Court found federal jurisdiction. *Red Cross*, 505 U.S. at 257.

The language in Fannie's charter, however, is far from identical. In *Red Cross* and *D'Oench*, there could be no argument, as there is here, that Congress chose language that expressly "look[s] to outside sources of jurisdictional authority." *Califano* 430 U.S. at 106

n.6. If Congress in 1954 had been looking to confer jurisdiction on the federal courts by modeling Fannie's sue-and-be-sued clause after the FDIC's (or the Red Cross's), it would not have included the phrase "of competent jurisdiction."

The difference was not lost on the parties in *Red Cross*. Even as it was urging this Court to find federal jurisdiction in its own charter, the Red Cross recognized that the "of competent jurisdiction" language in certain other charters—including Fannie's—"weakens the case for construing th[ose] statute[s] as a grant of original federal jurisdiction." Brief for Petitioner, *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247 (1992) (No. 91-594), 1992 WL 532904, at *32 n.4 (citing that very same point from *Califano*). It reasoned that the phrase "presuppose[s] that jurisdiction is determined by some body of law other than the sue-and-be-sued clause itself." *Id.*

The statutory context of the respective charters is also different, in that Congress drafted Fannie's charter against a default jurisdictional rule that did not apply (at least not clearly) to the Red Cross. Recall that § 1349 sets the default here because Fannie is a publicly traded corporation. Under § 1349, the federal courts have jurisdiction *only if* the United States owns "more than one-half of [the corporation's] capital stock." With this provision, Congress expressed its strong preference against granting automatic jurisdiction to stock corporations that, like Fannie, are not government-owned. *See supra* 25-27. At a minimum, this default rule casts doubt on the likelihood that Congress would use a sue-and-be-sued clause to achieve the same result it explicitly sought to avoid.

This Court in *Red Cross*, however, did not operate under the same constraint. As the Court observed, it was "unclear" whether § 1349 had any effect because the Red Cross is a "nonstock corporation[]." 505 U.S. at 251. Without a similarly strong indicator of Congress's jurisdictional views to guide it, the Court looked at other indicia to determine whether Congress would have wanted federal courts to have jurisdiction over all claims involving the Red Cross.

Those other indicia related to the evolution of the clause—which pointed one way in *Red Cross* and point the opposite way here. Congress amended the Red Cross's charter in 1947 to add language that made the clause indistinguishable from the one in *D'Oench*, as follows: "the power to sue and be sued in courts of law and equity, ***State or Federal,*** within the jurisdiction of the United States." *Red Cross*, 505 U.S. at 266 (emphasis added). The party opposing federal jurisdiction offered an explanation for this addition that the Court found implausible. *Id.* at 262. That left the Court to choose between (1) the conclusion that Congress added the phrase to grant automatic federal jurisdiction, and (2) the conclusion that Congress made the change for no reason. Invoking the canon "requiring a change in language to be read, if possible, to have some effect," the Court read the provision as granting automatic federal jurisdiction. *Id.* at 263.

Here, both the analysis and the canon point in the opposite direction. In Fannie's case, Congress started with language that was substantially identical to the language in *D'Oench* (and *Red Cross*), but moved *away* from it, in pretty much the same timeframe. The

most compelling explanation for that 1954 change to Fannie's charter is that Congress purposely affirmed that there would be no automatic federal jurisdiction (in keeping with the intention to privatize Fannie over time and let § 1349 govern the jurisdictional tipping point). *See supra* 27-28. The Ninth Circuit's approach reduces the amended charter language to a nullity—against *Red Cross*'s direction.

Plus, here we have an additional amendment, in 1974, also pointing the same way—a factor absent from both *Red Cross* and *D'Oench*.

C. If *Red Cross* did announce an "if federal, then jurisdiction" rule, it should be overruled.

If, despite all this, the Court agrees with the Ninth Circuit that *Red Cross* created an "if federal, then jurisdiction" rule, this Court should overrule that 5-4 decision. As the *Red Cross* dissent explained (and as discussed above, at 39-41), any such "'magic words' jurisprudence" is completely out of sync with how this Court interprets every other sort of statute. 505 U.S. at 265 (Scalia, J., dissenting).

Moreover, as we also explain above (at 42-47), such a rule would be a sharp departure from this Court's precedents. There is a good reason that the rule *Red Cross* actually articulated is that "federal court" is a necessary, but not sufficient, condition for jurisdiction: That is the only hard-and-fast jurisdictional principle embodied in this Court's cases.

Stare decisis typically counsels in favor of preserving precedent, but it is not an "inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), especially in a case like this. The ruling in *Red Cross* does not "govern primary conduct," so "the force of stare decisis is reduced." *Alleyne v. United States*, 133 S. Ct. 2151, 2164 (2013). And given the "confusion" and "anomalous results" that *Red Cross* produces among courts—like the Ninth Circuit in this case—that believe themselves obliged to follow a talismanic rule rather than read the statute's plain language, *see* Pet. 15-21, allowing the decision to stand would undermine the very purpose of stare decisis, *California v. Acevedo*, 500 U.S. 565, 579 (1991). Because eliminating, rather than extending, an "if federal, the jurisdiction" rule would "better preserve the law's coherence," *Citizens United v. FEC*, 558 U.S. 310, 378-79 (2010), this Court should repudiate any such rule.

III. The Canon Of Constitutional Avoidance Counsels In Favor Of Reversal.

The imperative to avoid constitutional difficulty provides an additional reason to construe Fannie's charter to require an independent basis for jurisdiction—and another ground for rejecting *Red Cross*. Interpreting the sue-and-be-sued clause as the Ninth Circuit did raises the thorny question whether Congress actually has the power under Article III to confer jurisdiction on the federal courts over all manner of Fannie suits, however trivial, simply because Fannie is a congressionally chartered corporation. To avoid this problem, the Court should read the statutory text consistently with its plain meaning—as *not* conferring such jurisdiction.

A. Article III authorizes Congress to "extend" the "judicial power" of the United States "to all cases ... arising under ... the laws of the United States." U.S. Const. art. III, § 2. Though broad, Congress's authority is not limitless. *See, e.g., Mesa v. California*, 489 U.S. 121, 136 (1989) (concluding that 28 U.S.C. § 1442(a)—the federal officer removal statute—"cannot independently support Art. III 'arising under' jurisdiction"); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 451-53 (1852) (Congress's "arising under" power under Article III does not justify a statute granting jurisdiction over vessels on the Great Lakes).

Red Cross concluded that the federal courts' jurisdiction over the Red Cross fell "within Article III's limits." 505 U.S. at 264. In so ruling, this Court relied on *Osborn* for the proposition that Article III's "arising under" jurisdiction "is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations." *Id.* The Court observed that it had "consistently reaffirmed" that holding in the years since—each time also relying entirely on *Osborn*—and was "loath" to reconsider the question. *Id.* (citing *Pac. R.R. Removal Cases*, 115 U.S. at 11-14; *In re Dunn*, 212 U.S. 374, 383-84 (1909); *Bankers' Trust*, 241 U.S. at 305-06; *People of Puerto Rico v. Russell & Co., Sucesores S. En. C.*, 288 U.S. 476, 485 (1933)). But there is good reason to question whether the Constitution—and *Osborn* itself—permit Congress to confer jurisdiction over cases involving corporations like Fannie merely because they have a federal charter.

In *Osborn*, this Court held that Congress did not exceed the scope of Article III when it conferred federal jurisdiction in the charter of the Bank of the United States. 22 U.S. at 828. The Court acknowledged that federal law would not provide the rule of decision in the case. *Id.* at 825. Nevertheless, it found the exercise of jurisdiction appropriate. The chain of logic was something of a bootstrap: (1) the Bank was the plaintiff; (2) the Bank had a federal charter; (3) an antecedent issue was whether the Bank had "a right to sue"; and (4) that question, in turn, "depend[ed] on a law of the United States"—i.e., on interpretation of the charter itself. *Id.* at 823-24. Because that question formed "[a]n original ingredient in every cause" involving the Bank, it was sufficient to bring the case within Article III's reach, even if the Bank's capacity to sue was not actually in dispute. *Id.*

Given the likelihood that no actual federal question would be adjudicated in the case, *Osborn* has been understood to stand for the proposition that Article III permits Congress to confer federal jurisdiction over any case "that *might* call for the application of federal law." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492 (1983) (emphasis added); *see* Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 86 (2d ed. 1990) (under a literal reading of *Osborn*, "the mere possibility of a federal issue is sufficient to authorize Congress to bring a case into federal court").

As this Court has since acknowledged, this broad view of Congress's power "has been questioned." *Verlinden*, 461 U.S. at 492; *see Russell & Co.*, 288 U.S. at

485 (noting that *Osborn's* "doctrine has not been extended to other classes of cases," and declining to "extend the doctrine now"). As Justice Frankfurter explained 60 years ago, "[t]here is nothing in Article III that affirmatively supports the view that original jurisdiction over cases involving federal questions must extend to every case in which there is the potentiality of appellate jurisdiction." *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 481-82 (1957) (Frankfurter, J., dissenting).

These critiques are well-founded: Allowing Congress to grant jurisdiction over any case presenting a remote possibility of a federal question would read out of the Constitution virtually any limit to the reach of the "arising under" clause. "[I]t is a rare case indeed where a creative attorney (or, for that matter, a creative court or Congress) could not devise a conceivable federal issue." Redish, *supra*, at 86. In fact, the exercise requires little creativity. For example, under the "mere possibility" approach, a plaintiff could insert a potential federal issue into any case simply by asserting that the state law at issue is not preempted by federal law.

B. In light of these critiques, this Court has expressed significant misgivings about reading Article III so expansively. In *Verlinden*, the Court concluded that the constitutionality of Congress's grant of federal jurisdiction in the Foreign Sovereign Immunities Act (FSIA) depended on whether the statute "merely concern[ed] access to the federal courts," or whether it necessarily "involve[d] application of a body of substantive federal law." 461 U.S. at 496-97.

The Court upheld the FSIA's jurisdictional provision, because the statute requires a district court to apply "detailed federal law standards" respecting a foreign sovereign's immunity to suit "[a]t the threshold of every action." *Id.* at 493. Jurisdiction under the FSIA is therefore grounded on more than the "mere speculative possibility that a federal question may arise at some point in the proceeding." *Id.* In short, a suit that "*necessarily* raises questions of substantive federal law *at the very outset* ... 'arises under' federal law" for purposes of Article III. *Id.* (emphasis added); *see Lincoln Mills*, 353 U.S. at 450-51, 457 (the Labor Management Relations Act poses no "constitutional difficulty," because it can be fairly read to "fashion a body of federal law for the enforcement of ... collective bargaining agreements," not "merely give[] federal district courts jurisdiction in controversies that involve labor organizations").

Applying these principles—and the constitutional avoidance canon—this Court in *Mesa* read into a different jurisdictional statute the requirement that a substantive issue of federal law be present at the outset—even though that requirement was not in the text of the statute itself. The law in question was 28 U.S.C § 1442—the federal officer removal statute—which permits "any officer of the United States" sued in state court for action taken "under color of office" to remove the case to federal court. The question before the Court was whether the statute requires that the officer raise a "federal defense" to seek removal, or if it is sufficient that the officer is being sued over "the manner in which he has performed his federal duties." 489 U.S. at 124-25.

Though the removal statute does not speak of a "federal defense," the Court nonetheless held that removal was improper unless the party asserted such a defense. *Id.* at 139. Otherwise, a case to be removed under § 1442 would fail to present the "question[] of substantive federal law" that the Court found constitutionally crucial in *Verlinden*, 461 U.S. at 493; instead, the statute would "'do nothing more than grant jurisdiction over a particular class of cases,'" something the Court's precedents indicated was not within Congress's Article III power, *Mesa*, 489 U.S. at 136 (quoting *Verlinden*, 461 U.S. at 496); *see Genesee Chief*, 53 U.S. (12 How.) at 451 (a statute that "merely confers a new jurisdiction on the district courts" as "its only object and purpose" is not a proper exercise of Article III "arising under" jurisdiction). By reading a "federal defense" requirement into the statute—and ensuring that an actual issue of federal law was present in the case—the Court avoided "rais[ing] serious doubt" as to whether Congress's enactment "expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Mesa*, 489 U.S. at 136 (internal quotation marks omitted).

C. To avoid similarly "grave constitutional problems," *id.* at 137, this Court should decline to read the sue-and-be-sued clause in Fannie's charter as conferring federal jurisdiction over all cases to which Fannie is a party. This Court has "consistently attached [importance] to interpreting statutes to avoid deciding difficult constitutional questions where the text fairly admits of a less problematic construction." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 455 (1989); *see Crowell v. Benson*, 285 U.S. 22, 62 (1932).

That principle counsels reversal of the Ninth Circuit here. Like the removal statute in *Mesa*, if Fannie's charter grants jurisdiction at all, it "'does nothing more than grant jurisdiction over a particular class of cases,'" 489 U.S. at 136 (quoting *Verlinden*, 461 U.S. at 496); it does not "involve application of a body of substantive federal law," *Verlinden*, 461 U.S. at 496-97. In *Mesa* that fact was enough to compel the Court to read into § 1442 a statutory requirement not expressed in the text; here it merely gives the Court another reason to read Fannie's sue-and-be-sued clause in accord with the clause's plain meaning.[4]

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[4] Although commentators tend to read *Osborn* broadly, when considered in historical context it is consistent with a narrower view of Article III's reach. *Osborn* speaks in terms of whether a "cause of action" has a federal "ingredient," a term that had a specific meaning at the time. *See* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 853 (2004). It was "something a plaintiff had to plead or prove to succeed regardless of whether the matter was disputed." *Id.* Courts generally considered "the fact of incorporation" as "part of the right or title of any corporation in a lawsuit." *Id.* at 805. Accordingly, in 1824 a corporation generally had to "aver or prove the fact of incorporation as part of its cause, regardless of whether that fact was contested." *Id.* Because in *Osborn* a key "ingredient"—the fact of incorporation—turned on an interpretation of a federal statute (the Bank's charter), the case arose under the laws of the United States. 22 U.S. at 823.

Cases brought now under federal charters like Fannie's no longer present such issues. Under modern pleading rules, a party's corporate status need not be pleaded "[a]t the threshold." *See* Fed. R. Civ. P. 9(a) ("[A] pleading need not allege ... a party's capacity to sue or be sued."); Ariz. R. Civ. P. 9(a); Fla. R. Civ. P. 1.120(a); Me. R. Civ. P. 9(a); Wash. R. Civ. Ltd. Juris. 9(a). As a

Rejecting the argument that the mere fact of federal incorporation is sufficient for Article III purposes also helps avoid constitutionally absurd results. If a congressional charter alone justifies the exercise of federal jurisdiction, nothing in the Constitution prohibits Congress from extending jurisdiction to all such entities, no matter how remote they are from the activities of the federal government.

Take for example, Little League Baseball, whose purposes include "using the disciplines of the native American game of baseball, to teach spirit and competitive will to win, physical fitness through individual sacrifice, the values of team play, and wholesome well being through healthy social association with other youngsters under proper leadership." 36 U.S.C. § 130502. If a coach snubs a benchwarmer's request to be the starting pitcher, Congress can make a federal case out of it. Or consider the Society of American Florists and Ornamental Horticulturists, whose purpose is to "educate members of the florist industry and the public, and to promote scientific development, in floriculture and horticulture." 36 U.S.C. § 200102. A dispute over a late shipment of manure could also be brought in federal court if Congress so provided. As these examples illustrate, it would be highly questionable for Congress to extend Article III jurisdiction over all state law cases in which either of these entities is a party.

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result, the question of federal incorporation is no longer an "ingredient" of a "cause" in the *Osborn* sense, and the mere fact that a party to a lawsuit has been chartered by Congress is not sufficient to sustain a grant of jurisdiction under Article III.

Given the serious constitutional questions such a decision would raise, the Court should instead read Fannie's charter according to its plain meaning, and hold that it does not confer subject matter jurisdiction on the federal courts over all civil actions to which Fannie Mae is a party.

CONCLUSION

The Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

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